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3 **UNITED STATES DISTRICT COURT**4 **DISTRICT OF NEVADA**

5 UNITED STATES OF AMERICA,

6 Plaintiff,

7 vs.

8 RAYMOND LLOYD GROGINS,

9 Defendant.

Case No. 2:19-cr-00009-APG-NJK

**ORDER AND  
REPORT AND RECOMMENDATION**

(Docket No. 22)

10 This matter was referred to the undersigned Magistrate Judge on defendant Raymond  
11 Lloyd Grogins' motion to suppress statements and evidence. Docket No. 22. The Court has  
12 considered Defendant's motion and exhibit, the United States' response and exhibit, Defendant's  
13 reply, and the evidence and arguments presented at an evidentiary hearing held before the Court.  
14 Docket Nos. 22, 23, 24, 25, 26, 42.

15 **I. BACKGROUND**16 **A. Testimony of Sergeant Benjamins**

17 On October 8, 2018, at approximately 11:55 a.m., Henderson Police Department Sergeant  
18 Felicia Benjamins responded to a priority dispatch call involving a gun at a residence in Henderson,  
19 Nevada, due to the nature of the call. Docket No. 44 at 7. Sergeant Benjamins was not one of the  
20 first responding officers and responded as a supervisor because it was a gun call. *Id.* at 12-13.  
21 When Sergeant Benjamins arrived at the location, she observed that three individuals had been  
22 removed from the trailer and were on the sidewalk in handcuffs with officers watching over them.  
23 *Id.* at 13-14, 15. Sergeant Benjamins observed Defendant sitting on the curb in handcuffs

1 accompanied by Henderson Police Officer Smith. *Id.* at 8, 14, 15. Since Defendant was in  
2 handcuffs, it was likely that he had been patted down and Sergeant Benjamins was not informed  
3 whether any weapons were found on Defendant. *Id.* at 15. Sergeant Benjamins observed  
4 additional officers down the street toward the residence. *Id.* at 7, 23. Sergeant Benjamins' role  
5 was to observe and try to stabilize the situation. *Id.* at 7, 20. Sergeant Benjamins was also involved  
6 in investigating the incident. *Id.* at 20.

7 Sergeant Benjamins approached Defendant, who was sitting on the curb in handcuffs  
8 engaged in "a dialogue" with Officer Smith. *Id.* at 8. Sergeant Benjamins told Defendant that he  
9 was not under arrest and was in handcuffs for his safety, officer safety, and the safety of the  
10 community since the instant dispatch call was a gun call and officers were trying to make the scene  
11 safe and decipher what had occurred. *Id.* Sergeant Benjamins told Defendant he was not in  
12 custody at that time. *Id.* at 10, 11. Defendant was not free to leave during this time, however. *Id.*  
13 at 22. During the time that Sergeant Benjamins was present, she observed Officer Smith speaking  
14 to Defendant, though she did not know if it was just dialogue or interrogation; however, she never  
15 heard Officer Smith give *Miranda* warnings to Defendant. *Id.* at 16-17.

16 Since the dispatch call stated that a white truck was involved in the incident, Sergeant  
17 Benjamins asked Defendant if the white truck parked in front of the trailer belonged to him. *Id.* at  
18 9, 17. Defendant responded that it was not his truck. *Id.* at 19. Sergeant Benjamins also asked  
19 Defendant whose gun had been part of the incident and Defendant responded that the gun belonged  
20 to his friend. *Id.* at 17-18, 19. Sergeant Benjamins asked Defendant if he knew where the gun  
21 was and if the gun came into play during the incident. *Id.* at 19, 24-25. Defendant said that the  
22 firearm was in the back of the truck and that it had been in a bag the entire time. *Id.* at 19-20, 24-  
23 25. Sergeant Benjamins also asked Defendant if it was all right with him if she looked in the truck

1 because he had already said the firearm was there. *Id.* at 9. Sergeant Benjamins did not advise  
2 Defendant of his *Miranda* rights prior to asking him questions. *Id.* at 19. Sergeant Benjamins  
3 asked about the firearm for safety so it could be secured, though Defendant and the other two  
4 possible suspects had already been secured at that time. *Id.* at 25-26.

5 Sergeant Benjamins walked over to the truck and saw that the gun was in the bed of the  
6 truck. *Id.* at 19-20. Defendant was arrested for possessing brass knuckles that day but was not  
7 arrested for any charge relating to the gun on October 8, 2018. *Id.* at 21-22.

#### 8 **B. Testimony of Officer Smith**

9 On October 8, 2018, Henderson Police Department Police Officer Michael Smith was  
10 dispatched to a family disturbance in Henderson, Nevada that he was told involved two males  
11 arguing with each other and one of them brandishing a shotgun. *Id.* at 27-28, 39.<sup>1</sup> The dispatch  
12 came about as a result of a 911 call reporting the disturbance. *Id.* at 37. Due to the nature of the  
13 call, approximately six officers responded to the scene. *Id.* at 28. The call stated that the incident  
14 included two white males and a white pickup truck. *Id.* at 29. The call described the male with a  
15 firearm as a white male wearing a white hat and shirt; however, Defendant's hat was grey and his  
16 shirt was not white. *Id.* at 40, 42.

17 When Officer Smith arrived on the scene, he parked at the entrance to the trailer park and  
18 proceed, along with other officers, on foot toward the residence. *Id.* at 29. Outside of the  
19 residence, Officer Smith observed the pickup truck, as well as two males and a female behind a  
20 chain link fence. *Id.* As they approached, the officers' guns were drawn due to the nature of the

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21 <sup>1</sup> On direct examination, Officer Smith testified that the call stated two brothers were  
22 involved in the incident. Docket No. 44 at 27-28. After refreshing his recollection with his report  
23 on cross examination, however, Officer Smith testified that the call stated two males, not brothers,  
were involved in the incident. *Id.* at 39.

1 call. *Id.* at 29, 43-44. Officer Smith issued commands to the three people to put their hands up  
2 and walk toward him outside of the fence; all three complied with the commands. *Id.* at 29, 44.  
3 As Defendant approached Officer Smith, while Officer Smith's weapon was pointed in his  
4 direction, the officer told him to lift his shirt up and turn in a circle to determine that Defendant  
5 had no weapons in his waistband, then to walk closer, turn around, and get on his knees. *Id.* at 29-  
6 30, 45. Officer Smith saw no weapons on Defendant at that time. *Id.* at 45-46. When Defendant  
7 reached Officer Smith, he immediately "took [Defendant] into custody" and put handcuffs on him.  
8 *Id.* at 30, 46.

9 After assisting in taking the other two people – one of whom was Defendant's brother –  
10 into custody, Officer Smith returned to Defendant. *Id.* at 30-31, 48. At this point, all three potential  
11 suspects were in handcuffs and secure, and separated from each other. *Id.* at 48-49, 51. Officer  
12 Smith, who was standing while Defendant sat on the curb, first asked Defendant why he thought  
13 police were present at the scene, not where the shotgun was located. *Id.* at 51-52, 74, 80. Next,  
14 Officer Smith asked Defendant if anyone else was in the trailer, and Defendant said no. *Id.* at 52.  
15 Officer Smith then asked Defendant where the shotgun was. *Id.* Officer Smith asked Defendant  
16 where the shotgun was six times before Defendant answered the question. *Id.* at 53. When  
17 Defendant told the officer where the shotgun was and gave him permission to look for the gun in  
18 the back of the truck, the officer told other officers, then continued questioning Defendant. *Id.* at  
19 34, 54-55.

20 After the shotgun had been secured, Officer Smith continued questioning Defendant - he  
21 asked Defendant his name, date of birth, social security number, where he lived, and what the fight  
22 was about. *Id.* at 31, 55. Defendant responded to these questions and never refused to answer  
23 them. *Id.* at 31, 51. Defendant told Officer Smith that he and his brother got into an argument that

1 morning and his brother wanted him to leave the house. Defendant did not want to walk down  
2 Sunset or Boulder Highway with his backpack and shotgun, so he put the shotgun into his truck  
3 before the officers arrived. *Id.* at 32. Defendant further told Officer Smith that the shotgun  
4 belonged to his friend Showboat, who gave it to him to hold; that he never pointed the gun at  
5 anyone; that the gun was not involved in the incident; and that he put it in the back of the pickup  
6 truck. *Id.*

7 During this period, Officer Smith considered Defendant detained but not under arrest. *Id.*  
8 at 33, 75. According to Officer Smith, family disturbances are inherently dangerous and adding a  
9 firearm “brings it to a whole different level.” *Id.* at 33. When Officer Smith first contacted  
10 Defendant, he patted him down for weapons, discovered brass knuckles in his pocket, and removed  
11 them so that no one on the scene would have access to them. *Id.* at 33, 46. Therefore, for his  
12 safety and the safety of the community, Officer Smith did not feel comfortable removing  
13 Defendant’s handcuffs. *Id.* at 33.

14 While questioning Defendant, Officer Smith further asked if he had ever been arrested  
15 before and Defendant responded that he had been arrested for assault with a deadly weapon in  
16 California. *Id.* at 34, 56. Officer Smith also asked Defendant how long he had lived in Las Vegas  
17 and whether he had registered as a felon in Las Vegas. *Id.* at 57. Throughout this questioning,  
18 Officer Smith never read Defendant his *Miranda* rights. *Id.* at 55-56, 57. Defendant remained in  
19 handcuffs and was not free to leave. *Id.* at 56.

20 Officer Smith was able to run a local records check on Defendant, but the national database  
21 was not working that day, so he could not determine whether Defendant had a prior felony  
22 conviction. *Id.* at 34-35. Nonetheless, Officer Smith arrested Defendant for possessing brass  
23 knuckles and for felon in possession of a firearm. *Id.* at 35. Officer Smith had Defendant stand

up, conducted a complete search of Defendant, placed Defendant in the back of his patrol car, and read Defendant his rights pursuant to *Miranda*. *Id.* at 35, 57-58. Defendant said that he understood his rights and continued to talk to the officer. *Id.* at 35, 59. The *Miranda* rights were given approximately 30 minutes after the shotgun was seized. *Id.* at 58-59. All of the information that Officer Smith had to arrest Defendant for felon in possession of a firearm – that he was a convicted felon who hadn’t registered in Nevada and possessed a shotgun that day – came from Defendant’s pre-*Mirandized* statements. *Id.* at 60. After Officer Smith advised Defendant of his *Miranda* rights, he asked him questions to elicit the same information that he had elicited from Defendant prior to giving him his *Miranda* rights. *Id.* at 61.

Officer Smith transported Defendant to jail, where he discovered that the national database was still down and he could not confirm Defendant’s prior felony, so he transported Defendant back to his residence and issued a citation for possession of brass knuckles. *Id.* at 36, 62. When the database came back up and Officer Smith confirmed Defendant’s prior felony, he drafted an affidavit for a search warrant to arrest Defendant for convicted felon failing to register and prohibited person in possession of a firearm. *Id.* at 63. Officer Smith never considered applying for a search warrant because Defendant told him where the firearm was located and gave him consent to go into the truck and recover it. *Id.*

## **II. ANALYSIS**

### **A. Credibility of Witnesses**

The Court ordered an evidentiary hearing in order to make an accurate determination of what occurred in the instant case and how the facts relate to the applicable caselaw. “The longstanding and repeated invocations in caselaw of the need of district courts to hear live testimony so as to further the accuracy and integrity of the factfinding process are not mere

1 platitudes. Rather, live testimony is the bedrock of the search for truth in our judicial system.”  
2 *United States v. Thoms*, 684 F.3d 893, 903 (9th Cir. 2012). “[J]udges simply cannot decide  
3 whether a witness is telling the truth on the basis of a paper record and must observe the witnesses’  
4 demeanor to best ascertain their veracity - or lack thereof.” *Oshodi v. Holder*, 729 F.3d 883, 892  
5 (9th Cir. 2013) (internal citation omitted). *See also United States v. Howell*, 231 F.3d 615, 621  
6 (9th Cir. 2000) (evidentiary hearing required where defendant demonstrates that a significant  
7 disputed factual issue exists); *United States v. Mejia*, 69 F.3d 309, 315 (9th Cir. 1995) (“There can  
8 be no doubt that seeing a witness testify live assists the finder of fact in evaluating the witness’s  
9 credibility”).

10 During the evidentiary hearing in this matter, the Court had the opportunity to listen to the  
11 testimony of all witnesses, to observe and evaluate each witness’ demeanor while testifying, and  
12 to weigh each witness’ credibility. Having done so, while the Court finds herein that the officers  
13 made mistakes on the scene of the incident that impact the motion to suppress, the Court finds that  
14 both Sergeant Benjamins and Officer Smith testified credibly and, in fact, were completely open  
15 and honest throughout the evidentiary hearing.

#### 16 **B. Motion to Suppress**

17 Defendant asks the Court to suppress his statements and the firearm recovered from the  
18 truck. *See* Docket No. 22. In support of his request, Defendant submits that the officers engaged  
19 in an illegal two-step protocol in violation of his *Miranda* rights, that his statements were  
20 involuntary under the totality of the circumstances and obtained in violation of the Fifth  
21 Amendment, and that the shotgun is fruit of the poisonous tree. *Id.* at 5-6. Defendant submits that  
22 officers were required to advise him of his *Miranda* rights prior to his initial statements, as they  
23 are the result of custodial interrogation. *Id.* at 6-9. Defendant further submits that the midstream

1 *Miranda* rights fail to cure this deficiency and, therefore, asks the Court to suppress all statements  
2 made after the midstream *Miranda* rights. *Id.* at 10-12.

3 Defendant additionally submits that his statements were involuntary because he was  
4 surrounded by officers who pointed guns at him, patted down and handcuffed, placed on a curb,  
5 and interrogated by an officer standing over him without being informed of his right to remain  
6 silent or his right to have counsel present. *Id.* at 14. Defendant submits that, when he did not  
7 initially provide an answer to Officer Smith's question regarding the location of the shotgun,  
8 Officer Smith repeated the question numerous times until he responded, indicating that compliance  
9 was mandatory. *Id.* Further, Defendant submits that Officer Smith's tone, positioning over  
10 Defendant and line of questioning was coercive and that Sergeant Benjamins' arrival and similar  
11 line of questioning was also coercive. *Id.* Under the circumstances of the interrogation, Defendant  
12 submits, his will was overborne and he responded to the questions in a manner that incriminated  
13 himself. *Id.* at 14-15.

14 Finally, Defendant submits that the shotgun is fruit of the poisonous tree. *Id.* at 15.  
15 Defendant submits that officers were able to locate the shotgun and charge him with possessing  
16 due to his involuntary statements. *Id.* Therefore, Defendant asks the Court to suppress his  
17 statements and the shotgun. *Id.* at 16.

18 In response, the United States submits that reasonable suspicion existed to detain  
19 Defendant. Docket No. 24 at 4-7. Specifically, the United States submits that the circumstances  
20 of the call allowed officers to detain Defendant until they could determine if the scene was safe.  
21 *Id.* at 5-6. The United States next submits that Defendant "spontaneously uttered several  
22  
23



1 statements” while initially detained without officers questioning him.<sup>2</sup> *Id.* at 7, 9. The United  
2 States further submits that, although Officer Smith became “stern” when Defendant initially did  
3 not respond to his questions about the gun, he was otherwise “pleasant and non-demanding.” *Id.*  
4 at 8.

5 The United States submits that Defendant’s statement was voluntary, as he spoke  
6 spontaneously to Officer Smith and later waived his *Miranda* rights. *Id.* The United States seems  
7 to argue, with no authority, that Defendant did not need to be Mirandized, as he had been arrested  
8 before and, therefore, “had knowledge of the system.” *Id.* at 9. The United States analogizes the  
9 instant situation to one in which a suspect was found to have validly waived *Miranda* rights during  
10 custodial interrogation. *Id.* at 8-9. Finally, in response to Defendant’s argument regarding the  
11 shotgun, the United States solely states, “Defendant’s argument that the gun must be suppressed  
12 is not supported by case law and must be dismissed.” *Id.* at 5. The United States cites to no  
13 caselaw at all and never returns to this topic. *See* Docket No. 24.

14 In reply, Defendant submits that he was clearly subjected to custodial interrogation.  
15 Docket No. 26 at 2-5. Defendant submits that the burden falls on the United States to demonstrate  
16 that his statement was voluntary and that the United States has failed to carry that burden. *Id.* at  
17 5. Defendant further submits that the post-*Miranda* statements are a result of an illegal two-step  
18 interrogation protocol in violation of his rights. *Id.* at 6-9. Additionally, Defendant submits that  
19 his statements were involuntary. *Id.* at 9. Finally, Defendant submits that the seizure of the  
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21 <sup>2</sup> The Court is troubled by this and other representations made by the Assistant United States  
22 Attorney assigned to the instant case. This representation is clearly not true, as demonstrated both  
23 by the bodycam of Officer Smith (which the AUSA had in her possession prior to writing her  
response) and by the credible testimony of both Sergeant Benjamins and Officer Smith.

1 shotgun constitutes fruit of the poisonous tree. *Id.* Defendant, therefore, asks the Court to suppress  
2 his statements and the shotgun. *Id.* at 10.

### 3 **1. Pre-Miranda Statements**

4 Law enforcement personnel who wish to question individuals in their custody must first  
5 afford them certain procedural rights. The most salient of these rights are the so-called “*Miranda*  
6 warnings” - prior to questioning, an officer must tell a suspect “that he has the right to remain  
7 silent and also the right to the presence of an attorney.” *Robertson v. Pichon*, 849 F.3d 1173, 1183  
8 (9th Cir. 2017) (quoting *Edwards v. Arizona*, 451 U.S. 477, 482 (1981)). The *Miranda* warnings  
9 are designed to secure a person's Fifth Amendment privilege against compelled self-incrimination.  
10 The Supreme Court has reasoned that the privilege is protected when a person is adequately and  
11 effectively advised of his or her rights. *See id.*; *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). “In  
12 order to combat [the pressures inherent in custodial interrogation] and to permit a full opportunity  
13 to exercise the privilege against self-incrimination, the accused must be adequately and effectively  
14 apprised of his rights.” *United States v. Williams*, 435 F.3d 1148, 1151 (9th Cir. 2006) (quoting  
15 *Miranda*, 384 U.S. at 467).

16 The “touchstone” for *Miranda* warnings is whether the suspect was in custody when  
17 interrogated. *United States v. Barnes*, 713 F.3d 1200, 1205 (9th Cir. 2013) (citing *Rhode Island*  
18 *v. Innis*, 446 U.S. 291, 300 (1980)). To determine whether an individual was in custody, the Court  
19 must examine the totality of the circumstances. *See Thompson v. Keohane*, 516 U.S. 99, 112  
20 (1995). The test is whether “a reasonable innocent person in such circumstances would conclude  
21 after brief questioning [that] he or she would not be free to leave.” *United States v. Bassignani*,  
22 575 F.3d 879, 883-84 (9th Cir. 2009) (quoting *United States v. Booth*, 669 F.2d 1231, 1235 (9th  
23 Cir. 1981)). A *Miranda* warning functions both to reduce the risk that an involuntary or coerced

1 statement will be admitted at trial and to implement the Fifth Amendment’s self-incrimination  
2 clause. *Williams*, 435 F.3d at 1151. Thus, if a suspect in custody does not receive an adequate  
3 warning effectively apprising him of his rights before he incriminates himself, his statements may  
4 not be admitted as evidence against him. *Id.* at 1152. In determining whether a suspect was in  
5 custody, “the ultimate inquiry is simply whether there [was] a ‘formal arrest or restraint on freedom  
6 of movement’ of the degree associated with formal arrest.” *Stansbury v. California*, 511 U.S. 318,  
7 322 (1994) (quoting *California v. Beheler*, 463 U.S. 1121, 1125 (1983)).

8 “[T]he term ‘interrogation’ under *Miranda* refers ... to any words or actions on the part of  
9 the police (other than those normally attendant to arrest and custody) that the police should know  
10 are reasonably likely to elicit an incriminating response from the suspect.” *United States v.*  
11 *Williams*, 842 F.3d 1143, 1146-1147 (9th Cir. 2016) (internal citation omitted). Routine gathering  
12 of “background biological information, such as identity, age, and address, usually does not  
13 constitute interrogation.” *United States v. Washington*, 462 F.3d 1124, 1132 (9th Cir. 2006). *See*  
14 *also Pennsylvania v. Muniz*, 496 U.S. 582, 601 (1990) (answers to questions regarding defendant’s  
15 name, address, height, weight, eye color, date of birth, and current age were admissible in the  
16 absence of *Miranda* warnings); *United States v. Zapien*, 861 F.3d 971, 974-975 (9th Cir. 2017).  
17 Pre-*Miranda* questions about a person’s identity “are not unconstitutional even if identification of  
18 the person may help lead to the prosecution of that person for a crime.” *Id.* at 1133.

19 The determination of whether a defendant is in custody for purposes of the requirement to  
20 provide *Miranda* warnings is determined by examining the objective circumstances of the  
21 interrogation. *Stansbury*, 511 U.S. at 323. Because the Court is directed to examine the objective  
22 circumstances of the interrogation, the subjective views of either the suspect or the interrogating  
23 officer is not relevant to the determination of whether the defendant was in custody. *Id.* *See also*

1 *United States v. Leasure*, 122 F.3d 837, 840 (9th Cir. 1997). The Ninth Circuit has identified five  
2 factors relevant to the custody determination: “(1) the language used to summon the individual;  
3 (2) the extent to which the defendant is confronted with evidence of guilt; (3) the physical  
4 surroundings of the interrogation; (4) the duration of the detention; and (5) the degree of pressure  
5 applied to detain the individual.” *United States v. Kim*, 292 F.3d 969, 974 (9th Cir. 2002).

6 Here, the Court finds that, under the *Kim* factors, Defendant was clearly in custody when  
7 he was seated on the curb. Defendant was summoned from his location by police officers pointing  
8 guns at him and yelling commands. When he complied with the commands and approached the  
9 officers with his hands in the air, he was told to pull his shirt up, turn in a circle, turn his back to  
10 officers, and get on his knees. Defendant was then patted down and handcuffed. Next, Defendant  
11 was confronted with evidence of guilt – specifically, he was asked repeatedly by more than one  
12 officer where the gun was, to whom it belonged, and whether he had possessed it. Further, he was  
13 asked if he had a prior conviction and whether he had registered in Nevada. Third, the physical  
14 surroundings of the interrogation were that Defendant was handcuffed and seated on a curb while  
15 an armed officer – and, for a time, more than one - stood above him interrogating him. Fourth,  
16 Defendant was detained for approximately 30 minutes. Finally, Defendant was physically  
17 restrained while detained. The Court finds that a reasonable person, under these circumstances,  
18 would not feel free to leave and, therefore, Defendant was in custody.

19 The Court further finds that Officer Smith’s questions to Defendant while he was  
20 handcuffed on the curb extended far beyond background biographical information and constituted  
21 interrogation. Among other questions, Officer Smith asked Defendant six times where the shotgun  
22 was; he asked whose shotgun it was; he asked whether Defendant possessed the shotgun; he asked  
23 for permission to recover the shotgun; he asked Defendant if he had been convicted of a felony;

1 and he asked Defendant if he had registered in Nevada as a felon. Additionally, Sergeant  
 2 Benjamins asked Defendant if the white truck parked in front of the trailer belonged to him; whose  
 3 gun had been part of the incident; whether he knew where the gun was; if the gun came into play  
 4 during the incident; and if it was all right with him if she looked in the truck.

5 Based on the totality of the circumstances, the Court finds that Defendant was subjected to  
 6 custodial interrogation. Defendant was not advised of his *Miranda* rights prior to this custodial  
 7 interrogation.<sup>3</sup> Therefore, the Court finds that Defendant's statements were improperly obtained.  
 8 *Williams*, 435 F.3d at 1152 (if a suspect in custody does not receive an adequate warning  
 9 effectively apprising him of his rights before he incriminates himself, his statements may not be  
 10 admitted as evidence against him).<sup>4</sup>

## 11 **2. Post-Miranda Statements**

12 “[W]here law enforcement officers deliberately employ a two-step interrogation to obtain  
 13 a confession and where separations of time and circumstance and additional curative warnings are  
 14 absent or fail to apprise a reasonable person in the suspect's shoes of his rights, the trial court

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16 <sup>3</sup> Though not argued in briefing, the United States submitted at the evidentiary hearing that  
 17 the questions fell under the “public safety” exception to *Miranda* warnings. See *New York v.*  
 18 *Quarles*, 467 U.S. 649 (1984). This exception covers situations in which “there was an objectively  
 19 reasonable need to protect the police or the public from any immediate danger.” *Williams*, 842  
 20 F.3d at 1149 (quoting *United States v. Carrillo*, 16 F.3d 1046, 1049 (9th Cir. 1994)). The exception  
 allows an officer to ask “narrowly tailored question[s that constitute] a reasonable attempt by [the]  
 police officer to insure his personal safety.” *Carrillo*, 16 F.3d at 1050. The facts, as determined  
 by the officers’ testimony in the evidentiary hearing, clearly establish that the pre-*Miranda*  
 questions asked were not narrowly tailored to personal safety; therefore, this argument fails.

21 <sup>4</sup> “[A] statement is involuntary when the suspect’s will was overborne in such a way as to  
 22 render his confession the product of coercion.” *United States v. Latz*, 162 Fed.Appx. 113, 118 (3d  
 23 Cir. 2005) (quoting *Lam v. Kelchner*, 304 F.3d 256, 264 (3d Cir.2002)) (quotations omitted).  
 Under the totality of the circumstances, the Court finds that the United States has failed to  
 demonstrate that Defendant’s statements were voluntary.

1 should suppress the confession.” *Williams*, 435 F.3d at 1158 (citing *Missouri v. Seibert*, 542 U.S.  
2 600 (2004)) (emphasis removed). Specifically, “[a] two-step interrogation involves eliciting an  
3 unwarned confession, administering the *Miranda* warnings and obtaining a waiver of *Miranda*  
4 rights, and then eliciting a repeated confession.” *United States v. Narvaez–Gomez*, 489 F.3d 970,  
5 973–74 (9th Cir. 2007).

6 In *Seibert*, the Court found that midstream *Miranda* warnings have inherent issues. For  
7 example, “telling a suspect that ‘anything you say can and will be used against you,’ without  
8 expressly excepting the statement just given, could lead to an entirely reasonable inference that  
9 what he has just said will be used, with subsequent silence being of no avail.” *Seibert*, 542 U.S.  
10 at 613. Thus, the Court found, “when *Miranda* warnings are inserted in the midst of coordinated  
11 and continuing interrogation, they are likely to mislead and ‘depriv[e] a defendant of knowledge  
12 essential to his ability to understand the nature of his rights and the consequences of abandoning  
13 them.’” *Id.* at 613-614 (citing *Moran v. Burbine*, 475 U.S. 412, 424 (1986)). The Court further  
14 found that “it would ordinarily be unrealistic to treat two spates of integrated and proximately  
15 conducted questioning as independent interrogations subject to independent evaluation simply  
16 because *Miranda* warnings formally punctuate them in the middle.” *Id.* at 614.

17 The *Seibert* Court instructs that a series of facts are relevant in determining whether  
18 midstream *Miranda* warnings remedy the failure to warn prior to a first confession: “the  
19 completeness and detail of the questions and answers in the first round of interrogation, the  
20 overlapping content of the two statements, the timing and setting of the first and the second, the  
21 continuity of police personnel, and the degree to which the interrogator’s questions treated the  
22 second round as continuous with the first.” *Id.* at 615.

1 Here, the first round of interrogation consisted of complete and detailed questions and  
2 answers. Officer Smith and Sergeant Benjamins asked Defendant numerous questions that  
3 covered all aspects of the crimes with which Defendant was charged, including the location of the  
4 gun, whether Defendant possessed it, whether Defendant owned it, whether it was “in play” during  
5 the argument, whether Defendant has a prior conviction, and whether Defendant registered in  
6 Nevada. In addition, the second interrogation consisted solely of Officer Smith re-asking the same  
7 questions he and Sergeant Benjamins asked during the first interrogation. Therefore, police  
8 continuity occurred and the two statements clearly overlapped. Further, the Court finds there was  
9 no change of scenery between the first and second interrogations. Rather, the second interrogation  
10 occurred at the same area as the first – only inside Officer Smith’s car rather than sitting on the  
11 curb outside – within 30 minutes of the first interrogation. Finally, the second interrogation  
12 appears to be a continuation of the first. Therefore, under *Siebert*, the *Miranda* warnings given  
13 midstream do not cure the lack of *Miranda* warnings prior to Defendant’s initial custodial  
14 interrogation, and the Court finds that the statements in the second interrogation were improperly  
15 obtained.

### 16 3. Seizure of Firearm

17 The Court has already found that Defendant’s statements were improperly obtained and  
18 the officers found the gun based on Defendant’s statement regarding its location and permission  
19 to search the truck. The United States has failed to raise any argument as to how the gun may fall  
20 within any exceptions to the exclusionary rule.<sup>5</sup> “[J]udges [are not required] to anticipate and join

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21  
22 <sup>5</sup> The United States, in fact, failed to make any argument regarding the requested suppression  
23 of the gun or cite to any authority whatsoever. The United States’ entire discussion regarding the  
requested suppression of the gun amounts to one sentence. *See* Docket No. 24 at 5.

arguments that are never raised by the parties. *See United States v. Griffiths*, 47 F.3d 74, 77 (2d Cir. 1995). Instead courts rely on the litigants not only to cite relevant precedents, but also to frame the issues for decision.” *United States v. Dupree*, 617 F.3d 724, 728 (3d Cir. 2010). Therefore, the Court finds that the United States waived any arguments regarding the inapplicability of the exclusionary rule. *See Kiessling v. Rader*, 2018 WL 1401972, at \*3 (D. Nev. Mar. 20, 2018) (“The appropriate time to raise these additional arguments has passed as Defendants should have raised these arguments before Judge Koppe”); *see also Kor Media Grp., LLC v. Green*, 294 F.R.D. 579, 582 n.3 (D. Nev. 2013) (courts only consider meaningfully-developed arguments).

As the United States has presented no meaningful argument in response to Defendant’s request for suppression of the gun, the Court finds that the gun was improperly seized as fruit of the poisonous tree. *See United States v. Rose*, 189 F.Supp.3d 528, 544-546 (D.V.I. 2016).

### **III. RECOMMENDATION**

Based on the foregoing and good cause appearing therefore,

IT IS RECOMMENDED that Defendant’s motion to suppress evidence, Docket No. 22, be **GRANTED**.

DATED: November 1, 2019.

  
\_\_\_\_\_  
NANCY J. KORPE  
UNITED STATES MAGISTRATE JUDGE

### **NOTICE**

This report and recommendation is submitted to the United States District Judge assigned to this case pursuant to 28 U.S.C. § 636(b)(1). A party who objects to this report and



1 recommendation must file a written objection supported by points and authorities within fourteen  
2 days of being served with this report and recommendation. Local Rule IB 3-2(a). Failure to file  
3 a timely objection may waive the right to appeal the district court's order. *Martinez v. Ylst*, 951  
4 F.2d 1153, 1157 (9th Cir. 1991).